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FEDERAL COMMUNICATIONS COMMISSION
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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Southwestern Bell Telephone Company,)
Pacific Bell, and Nevada Bell Petition for)
Relief from Regulation Pursuant to Section)
706 of the Telecommunications Act of 1996)
and 47 U.S.C. § 160 for ADSL)
Infrastructure and Service)

CC Docket No. 98-91

**OPPOSITION COMMENTS OF
HYPERION TELECOMMUNICATIONS, INC.**

Hyperion Telecommunications, Inc. ("Hyperion"), by its counsel, and pursuant to the Federal Communications Commission's ("Commission") Public Notice, DA 98-1111 (rel. June 11, 1998), hereby submits the following Comments in opposition to Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell's (the "SBC LECs") Petition ("Petition") for relief in the above-captioned proceeding.

INTRODUCTION

The SBC LECs' Petition is the most recent in a series of Bell Operating Company ("BOC") petitions seeking to be excused from the provisions of the Telecommunications Act of 1996 ("1996 Act") which are designed to ensure that competition develops prior to BOC entry into the in-region interLATA market. The SBC LECs' Petition suffers from the same fatal flaws from which the previous BOC petitions suffer, and should be summarily dismissed.

The SBC LECs have requested a waiver from the unbundling and wholesale obligations contained in the 1996 Act for their ADSL services under Section 706 of the 1996 Act, or in the alternative, Section 10 of the Communications Act of 1934. The Commission quite simply does not

have the authority to grant the relief requested. Furthermore, even if the 1996 Act did provide the Commission with the requisite authority, the Petition should still be denied because competition and consumer choice is better than a monopolistic stranglehold over an essential service offering.

In support of their Petition, and after providing the Commission with a misleading description of ADSL services, the SBC LECs have stated that they are committed to ensuring that competitors such as Hyperion have equivalent access to the unbundled loops necessary for the provisioning of ADSL services. Even a cursory reading of the Petition reveals, however, that they intend to make such loops available on their terms and conditions in a time frame set by them. The SBC LECs have even proposed that all competitor requests for unbundled loops will be subject to a rigorous three part test in which they, in their sole discretion, will decide whether suitable loops are available for the provisioning of ADSL services. With little or no incentive on the part of the SBC LECs to facilitate competitive entry into the ADSL market, competitors such as Hyperion have no reason to believe that the SBC LECs will make ADSL qualified loops available to them on a just, reasonable, and nondiscriminatory basis.

In an attempt to degrade further the chance that meaningful competition will develop in the ADSL market, the SBC LECs have requested a waiver from the unbundling and wholesale obligations contained in the 1996 Act for their ADSL service offerings. The SBC LECs, with their monopoly bottleneck facilities, are well aware that they control virtually all of the existing copper loops that are necessary for the provisioning of ADSL services. An exclusion from the 1996 Act's obligations would leave the SBC LECs as the unfettered dominant provider of ADSL services in their markets, with continued exclusive domain over the copper loops to which competitors must have access to provision their own ADSL services.

In sum, the SBC LECs have requested that they not be required to provide competitors with unbundled access to their ADSL services, and that they not be required to make their ADSL services available for resale at a wholesale discount, thus limiting two of the three avenues envisioned by the 1996 Act for competitive entry into new markets. Where competitors such as Hyperion wish to purchase the underlying loops necessary for provisioning ADSL services, the SBC LECs will subject such requests to a grueling three part test in an effort to determine whether, in the SBC LECs' sole judgment, suitable facilities exist for provisioning ADSL services.

The SBC LECs (and other BOCs) have filed Section 706 petitions that are both procedurally unsound, because the 1996 Act does not provide the Commission with the authority to grant the relief requested, and should fail on their merits if they were reached. It is likely that these petitions have been filed by BOCs in an effort to force the Commission to deny their requests, so the BOCs can once again complain, as they have with their Section 271 denials, that they are being treated unfairly. In fact, the BOCs' unfair treatment of their competitors, and their failure to comply with the obligations set forth in Section 251, have caused the denial of their Section 271 applications. Contrary to BOC arguments, Section 706 should be employed to ensure BOC compliance with their obligations under the 1996 Act, not as a way to circumvent those requirements. This Commission must not be misled, and must be unwavering in the face of these blatant BOC pressure tactics. The SBC LECs' (and similar BOC requests in other proceedings) request for relief in this proceeding must be denied.

I. Competition in the High-Speed Data Market Would Be Stifled or Crushed by Grant of the SBC LECs' Petition

The SBC LECs properly note that consumers are enjoying an increasing selection of new services and technologies that can provide high-speed data services. *Petition* at 10. Numerous new entrants are investing substantial amounts of money in developing their advanced service offerings, particularly ADSL. Contrary to the SBC LECs' depiction, however, these competitors are still in their early stages of development.

Competitor opportunities to provide advanced services remain dependent on BOC actions and access to the BOCs' ubiquitous networks on just, reasonable and nondiscriminatory terms. Competitors have recognized the ability to use existing infrastructure (such as copper loops) for, and have devoted significant resources towards, providing high speed access to local end-users. As Hyperion has previously indicated, both new and established competitors would be in a position to provision access to high-speed data networks for local customers today but for the stumbling blocks that BOCs have erected to prevent competitor advances on this and other fronts.

As long as BOCs do not live up to their obligations under Section 251 of the 1996 Act, they continue their monopoly control of copper loops, central offices, and other facilities essential for ADSL and other high speed data offerings. In view of the well-documented instances of BOC noncompliance with Section 251 (as discussed in the comments to previous BOC 706 petitions and numerous other proceedings), it is reasonable to conclude that such instances of non-compliance will increase exponentially if the Petition were granted, and all compliance incentives were thus removed. The inevitable result would be the stifling of competition, and thus the denial to consumers of access to high-speed data service provider choices.

The SBC LECs devote substantial energy in their Petition to suggesting the existence of alternative high-speed data access service offerings from various providers, including cable modem service providers, satellite-based Internet access providers, and ADSL competitors. The SBC LECs did not credibly demonstrate that the facilities necessary to deploy ADSL services are independently available on anything resembling a widespread basis. They merely list a series of names of companies currently providing ADSL services in their territory. They fail to mention, however, that each of these companies is a very new entrant with no significant market penetration, and who is wholly dependent on the facilities which are completely dominated by the SBC LECs. Even less convincing is the SBC LECs' discussion of satellite-based Internet access. Although they make a passing reference to this service, they offer no facts or statistics of any kind as to the availability or market penetration of such services.

The SBC LECs' heavy reliance on the Cable Modem Service market provides particular insight into the weakness of their argument that high-speed data competition exists. In their Petition, the SBC LECs went to painstaking lengths to demonstrate that their "Petition is narrowly drawn to address only asymmetrical digital subscriber line service ("ADSL") infrastructure and services." *Petition* at 2. However, as discussed by the SBC LECs in their Petition, Cable Modem Service is a separate and distinct high-speed data service from ADSL service. ADSL service providers rely on the use and availability of existing copper loops controlled by the SBC LECs themselves. Cable Modem Service is a new and unproven service, which is still not available on a widespread basis. In any event, a discussion of Cable Modem Service provides no insight into the issues faced by an ADSL competitor since such a competitor must rely on the facilities of the SBC LECs.

Although the SBC LECs have selected this forum to attempt to demonstrate that high-speed data competition exists (knowing that Hyperion and other commentors would not have adequate time to perform an investigation and respond), Section 706(b) itself provides the proper guidance for making this determination. Section 706 directs the Commission to initiate a Notice of Inquiry to examine whether advanced telecommunications capability is being deployed in a reasonably and timely manner. The FCC has not taken this necessary procedural step which is a prerequisite to any action. Hyperion is confident that if the Commission did initiate such a Notice of Inquiry, Hyperion and other potential ADSL providers could resoundingly demonstrate that meaningful competition has not yet developed in high-speed data markets.

II. The SBC LECs' So-Called Commitment to Providing ADSL Capable Loops Will Result in ADSL Services Being Deployed Solely on the SBC LECs' Terms

The SBC LECs' "commitment" to ensuring that carriers have equivalent access to ADSL-qualified unbundled loops ensures nothing more than that the SBC LECs themselves will exercise unverifiable discretion about the availability of competitive access to loops, to say nothing of the onerous and lengthy "approval" process that the SBC LECs promise. The SBC LECs have proposed to review all competitor requests for ADSL-qualified loops and subject them to "three separate checks needed to determine the ADSL capability of a loop." *Petition* at 18. These three checks are: 1) Facility Availability – The SBC LECs will perform a check to determine whether the requisite copper loop is available to the requested physical location; 2) Loop Qualification Check – If a copper loop is available, the SBC LECs will then determine whether its length is suitable for ADSL services; and 3) Spectrum Management Check – The SBC LECs will check to ensure that the proposed new services will not affect existing services. *See Petition* at 18-19. If, in the SBC LECs'

estimation, the requested loop passes all three tests, they will make that loop available to a competitor for ADSL service.

The SBC LECs' so-called "commitment" to ensuring access to loops is nothing more than a subjective test that will give them even greater control over the circumstances under which competitors may offer ADSL services. Merely repeating the SBC LECs' proposal with respect to making loops available for ADSL reveals the absurdity of the plan. They have established no review process for their self imposed plenary decision making authority with respect to the availability of loops. Their proposal stands as a good example of why grant of their Petition would be a significant and unacceptable departure from the 1996 Act. The 1996 Act, recognizing that new entrants would be heavily reliant on the existing facilities of incumbents, sought to strike a delicate balance between the needs of competitors and the needs of new entrants. For example, the 1996 Act states that if an incumbent LEC were to deny collocation to a competitor, the incumbent LEC must demonstrate to the applicable state commission that such denial was necessary for technical reasons or due to space limitations. With respect to the availability of loops, however, the SBC LECs propose to have unfettered discretion as to whether adequate loops are available, with no obligation to justify denials to anyone.

Furthermore, the SBC LECs' proposed Spectrum Management Check is nothing more than a subjective test that will enable the SBC LECs to deny a competitor's loop request because it will interfere with the SBC LECs' *own services*. Notwithstanding the admitted technical difficulties (the check is currently done manually), the implications of the Spectrum Management Check are profound. The SBC LECs could potentially determine that interference exists merely because the competitor seeks to provide high-speed data service on the same loop over which the SBC LECs

provide voice services. One can be assured that the SBC LECs would not decline to provide ADSL services themselves over a loop which they are currently utilizing for voice services. The SBC LECs, like other BOCs, have little incentive to facilitate competitive entry into their markets. The only incentive that exists is the desire for Section 271 authority, which would be significantly undermined if the SBC LECs' Petition (or any other BOC 706 petition) were granted. Competitive entrants have been plagued to this point by poor performance on the part of BOCs, and have faced excessive delays and obstacles in their dealings with BOCs at every level.

The BOCs recognize that they have the power to discriminate against competitors by being in control of infrastructure, and have consistently utilized that advantage. This Commission should use Section 706 to ensure BOC compliance with their obligations under the 1996 Act, not as a way to circumvent those requirements. Until BOCs do so, they can and do act to hinder competitor efforts to offer advanced services and, in so doing, shore up their monopoly powers.

III. The 1996 Act Does Not Give the Commission Authority to Grant the SBC LECs' Petition

The SBC LECs are incorrect to suggest that Section 706 somehow trumps the 1996 Act's generic forbearance provisions, which by their terms may not be used to avoid Section 271. Since Hyperion discussed this issue in detail in its comments on previous BOC 706 petitions, Hyperion will comment only briefly on this issue, and incorporate its earlier comments by reference.^{1/} Simply put, Section 706 is a policy statement that gives the FCC discretion -- not the obligation -- to

^{1/} See *Petitions of Bell Atlantic Corporation, US WEST Communications, and Ameritech Corporation for Relief from Barriers to Deployment of Advances Telecommunications Services*, CC Docket Nos. 98-11, 98-26, and 98-32, *Opposition Comments of Focal Communications Corporation, Hyperion Telecommunications, Inc., KMC Telecom Inc., and McLeod USA Incorporated* (Apr. 6, 1998).

exercise regulatory forbearance with respect to *some* regulatory requirements. Section 706 must be read in the context of the Act and clearly cannot gut the express restrictions of the forbearance provisions of the Act, 47 U.S.C. §160(d), which forbid FCC exercise of regulatory forbearance until Sections 251(c) and 271 are fully implemented.

The Act's clear mandate to require incumbents to unbundle services and otherwise comply with the Section 271 competitive checklist for the purpose of promoting competition is not accidental. Congress imposed these conditions in an effort to prevent BOCs from using their control of bottleneck facilities (such as local loops) in one market to impede competition in other markets where competitors need access to the same facilities. Furthermore, as stated previously, even if Section 706 could be utilized in the manner that the SBC LECs wish, any action on their requests would require a Notice of Inquiry. There simply is no way given current conditions in the local exchange market that the requisite public interest and other showings under Section 706 could be satisfied.

IV. Grant of the SBC LECs' Petition is Not in the Public Interest

Any solution that decidedly favors an incumbent monopolist over potential competitive new entrants and the concomitant choice of services is not in the public interest. The SBC LECs' request for waiver from the unbundling and wholesale discount requirements of Section 251(c) for their ADSL services is a clear example, and should be rejected by this Commission as contrary to the public interest. Although they concede that CLECs have made substantial investments in the facilities necessary to provision ADSL services, they contend (without any support) that such investment would be discontinued if the SBC LECs were required to unbundle ADSL services or make such services available at a wholesale discount.

In requesting waiver of unbundling and wholesale requirements for ADSL services, the SBC LECs' true concern is obviously not over continued CLEC investment in ADSL facilities. Rather, they recognize that with their ubiquitous network and monopoly control over bottleneck facilities, particularly the local loop, they could roll out ADSL services on a widespread basis in a limited period of time, while limiting the availability of their facilities to all potential competitors. Freeing them from their obligations under the 1996 Act would result in the crushing of competition in the ADSL market. Competitors such as Hyperion must have unbundled access to the SBC LECs' ADSL facilities and must be able to purchase their ADSL retail service offerings at a wholesale discount in order to survive. Competitors could not conceivably deploy facilities rapidly enough to compete with the SBC LECs, who control virtually all existing copper loops. Thus the SBC LECs would be the only high-speed data service provider to provide ADSL service to any significant market segment in the foreseeable future.

Equally absurd is the SBC LECs' contention that dominant treatment is not necessary for an entity in total control of bottleneck facilities, since supposedly, competition will ensure that the SBC LECs' practices and charges are just, reasonable, and nondiscriminatory. According to the SBC LECs, "the effect of actual and potential competition...will fulfill the role of regulation." *Petition* at 31. As this Commission is well aware, actual or potential competition can only regulate an entity's behavior where that entity does not have dominant market power. New entrants have no market power, so the Commission should allow the market to regulate those carriers' behavior. However, when a carrier has market power, as the SBC LECs do, the Commission should regulate their behavior until the carrier no longer has monopoly power in the market, in order to protect the public interest. Regulation should seek to constrain the SBC LECs' ability to manipulate their

service offerings and to impede competition through anti-competitive pricing or practices. Until the SBC LECs are no longer dominant in their markets, consumers will not be able to freely move between service providers due to the absence of a competitive choice. Grant of the SBC LECs' Petition would ensure that such consumers would continue to have no high-speed data service provider choices.

V. The Commission Should Not Relax Regulation of the SBC LECs Until They Comply With Their Section 251(c) Obligations

The 1996 Act fundamentally changed telecommunications regulation by adopting a new regulatory regime to foster competition in the local telephone markets and to expand competition in the long distance markets. In order to open up the local exchange markets to competition, Section 251(c) imposes specific affirmative obligations upon ILECs, such as the SBC LECs, which have operated without genuine competition in their service areas for most of their history. The fact that the SBC LECs have not passed the Section 271 test is evidence of the monopoly control they still maintain over bottleneck local exchange facilities in their service territories.^{2/} Their promises notwithstanding, the SBC LECs have not shown that they have sufficiently opened their markets to competition and satisfied their obligations to provide non-discriminatory access to their network to competitors. Given the history of telephone monopolies, this Commission cannot and should not underestimate the potential anticompetitive effect of the SBC LECs' continued monopoly control over local loops, the last mile of facilities necessary to reach most customers. Needless to say,

^{2/} In order to incent ILECs to comply with the affirmative obligations set forth in Section 251, Congress adopted Section 271 of the 1996 Act, which requires that BOCs comply with their obligations under Section 251 before BOCs will be granted in-region interLATA authority. The SBC LECs have already filed for Section 271 authority in Oklahoma, and were rejected by this Commission, in a decision that was upheld by the D.C. Circuit.

Hyperion finds no comfort in the SBC LECs' assurances that they will implement accounting safeguards to ensure that their services are not cross-subsidized. This Commission must not relax the regulation of the SBC LECs until they comply with the obligations set forth in Section 251 of the 1996 Act.

VI. The SBC LECs' Description of ADSL is Misleading and Inappropriate

The SBC LECs have inappropriately attempted to utilize this forum to advance their untenable argument that traffic terminated to Internet service providers ("ISPs") is "interstate" in nature. As this Commission is aware, this issue is the subject of a separate proceeding at this Commission, as well as in numerous states. It is worth noting that each of the seventeen state Commissions that have considered this issue have decided against the position advocated by the SBC LECs, holding that traffic terminated to an ISP is local traffic.

The SBC LECs' characterization of traffic terminated to ISPs incorrect. In describing ADSL service, the SBC LECs stated that "ADSL establishes a permanent virtual channel ("PVC") over the SBC LEC's fast-packet network to a destination requested by the ADSL customer (*e.g.* corporate LAN, Internet provider of customer's choice)." *Petition* at 9. According to the SBC LECs, the typical application would be to establish a PVC to an ISP's router. The SBC LECs disingenuously proceed to state:

Once the PVC is established with that router, *the end-user essentially makes long distance calls* by entering or "dialing" the called party's Internet Protocol (IP) address (*e.g.* 155.179.79.70) or its associated Uniform Resource Locator (URL) name, *e.g.*, www.fcc.gov. The end-user's "call" or data transmission is terminated when the host computer (*typically in another state*) receives and responds...

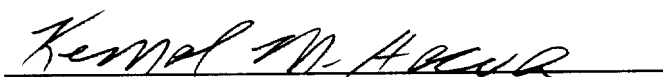
Petition at 9 (emphasis added). Later in their *Petition*, the SBC LECs state that "[i]nasmuch as Internet traffic is predominantly interstate in nature, the SBC LECs will file interstate tariffs to offer ADSL service." *Petition* at 22.

The SBC LECs' blatant attempt to use this proceeding to advance their own agenda in other proceedings is an outrage. The SBC LECs state in their *Petition* that they provided their description of ADSL "[i]n order to give the Commission a clear picture" as to the issues presented, and because "it would be helpful to provide detailed information about ADSL technology and services." *Petition* at 6. This Commission should be wary of such assistance. As may be expected, the SBC LECs are interested only in advancing their own self interest in this and other proceedings, not in educating the Commission or assisting its understanding of the issues. It is likely that they have raised these ancillary issues to distract this Commission from examining the fatal defects in their current *Petition*.

CONCLUSION

For the foregoing reasons, Hyperion Telecommunications, Inc. submits that the Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for relief from regulation pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL infrastructure and service should be denied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Dana Frix", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 1998, copies of the foregoing Opposition Comments of Hyperion Telecommunications, Inc. in CC Docket No. 98-91 were served by overnight delivery and hand delivery as indicated below:

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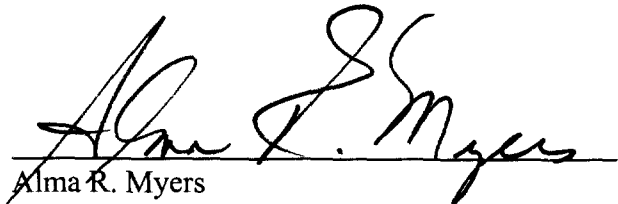
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